(10)

No. 84-1513

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

DANTE CARLO CIRAOLO,
Respondent.

On Writ Of Certiorari To The California Court of Appeal, First Appellate District

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia, non-profit corporation, with membership comprised of more than 4,000 lawyers, including representatives of every state. *Amicus* was founded 28 years ago to promote study and research in the field of Criminal Defense Law, to disseminate and

advance the knowledge of the law in the field of Criminal Defense Practice and to encourage the integrity, independence and expertise of the defense lawyer. Among NACDL's stated objectives is the promotion of proper administration of criminal justice. Consequently, NACDL concerns itself with the protection of individual rights by the improvement of the criminal law, its practices and procedures.

STATEMENT OF THE CASE

Amicus curiae adopts the statement of the case and facts set forth in the brief of respondent.

SUMMARY OF ARGUMENT

This case presents the question of whether a person who conceals his backyard from public view at ground level has shown a reasonable expectation of privacy that police will not observe his home from the sky.

New technology has afforded the police access to and permanent recordation of private places and activities that are not otherwise observable from the ground. The police cannot be permitted to force society to retreat into an opaque bubble in order to retain any reasonable expectation of privacy. Nor may the police be allowed to circumvent legitimate privacy interests merely because this advancing technology allows them to see into places they could not otherwise constitutionally invade absent a warrant.

ARGUMENT

I.

THE USE BY POLICE OF WARRANTLESS AERIAL SURVEILLANCE TO VIEW AND PHOTOGRAPH RESPONDENT'S FENCED, PRIVATE BACKYARD CONSTITUTED A SEARCH.

A search occurs when an expectation of privacy that society is prepared to consider as reasonable is infringed.

United States v. *Karo*, 468 U.S. ___, 82 L.Ed.2d 530, 539, 104 S.Ct. 3296, 3302 (1984); *United States* v. *Jacobsen*, 466 U.S. ___, 80 L.Ed.2d 85, 94, 104 S.Ct. 1652, 1656 (1984); *Illinois* v. *Andreas*, 463 U.S. ___, 77 L.Ed.2d 1003, 103 S.Ct. 3313 (1983); *United States* v. *Knotts*, 460 U.S. 276, 75 L.Ed.2d 55, 103 S.Ct. 1081 (1983); *Smith* v. *Maryland*, 442 U.S. 735, 739-41, 61 L.Ed.2d 220, 99 S.Ct. 2577 (1979).

The test for determining when official conduct constitutes a search

> . . . embraces two discrete questions. The first is whether the individual, by his conduct, has exhibited an actual (subjective) expectation of privacy. (citations omitted)—whether . . . the individual has shown that "he seeks to preserve [something] as private." (citation omitted). The second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as reasonable." (citation omitted)—whether . . . the individual's expectation, viewed objectively, is "justifiable" under the circumstances. (citation omitted).

Smith v. *Maryland*, 442 U.S. 735, 746, 61 L.Ed.2d 220, 99 S.Ct. 2577 (1979).[1]

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[1] Petitioner and several *amici*, following the English common law adage that the eye cannot commit a search, *Entick* v. *Carrington*, 19 How.St.Tr. 1029, 1066 (1765), argue that the Fourth Amendment precludes only warrantless *physical* entries by the police into areas that are expectedly private. Since this Court's decision in *Katz* v. *United States*, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967), Fourth Amendment analysis no longer requires a trespass. *See also United States* v. *Karo*, 468 U.S. ___, 82 L.Ed.2d 530, 104 S.Ct. 3296, 3302 (1984) (a physical trespass "is only marginally relevant to the question of whether the Fourth Amendment has been violated"); *Oliver* v. *United States*, 466 U.S. ___, 80 L.Ed.2d 214, 104 S.Ct. 1735 (1984); *United States* v. *Knotts*, 460 U.S. 276, 280, 75 L.Ed.2d 55, 103 S.Ct. 1081 (1983).

A. Respondent Exhibited A Subjective Expectation Of Privacy.

Respondent did all that could reasonably be expected for him to do in order to exhibit a subjective expectation of privacy by fencing his yard and concealing his activities from the police and public. (J.A. 11).[2] The only other precaution that he might have taken would have been to enclose his property in an opague bubble. Such a measure is neither aesthetically desireable nor is it constitutionally mandated.

In its brief, petitioner concedes that respondent had an actual expectation of privacy which could not have been lawfully breached by the police by jumping the fence, or by using conventional technology such as a ladder. (Pet. Br. at 13, 20-21). The fact that the government used 20th century technology, such as an airplane and a camera, to pierce respondent's privacy should be of no constitutional relevance. Even though the police resorted to this less earthly technology to avoid a physical trespass and circumvent the security of respondent's fence, they still intentionally breached respondent's actual expectation of privacy. *See Katz* v. *United States*, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507, (1967).

Despite its concession that respondent had an actual expectation of privacy, petitioner suggests that he should be denied this actual expectation merely because of the proximity of his house to a commercial airport. The record is totally devoid, however, of evidence that any other aircraft had ever flown over respondent's house at any

[2] The designation "J.A." refers to the Joint Appendix. "Pet. Br." refers to Petitioner's Brief.

altitude,[3] and certainly not as low as 1,000 feet. No facts in this record can be claimed to have reduced respondent's expectation of privacy which would not apply with equal force to every resident of a suburban or urban area in this country. Petitioner's and *amicus curiae's* reliance on *United States* v. *Ailen*, 633 F.2d 1282 (9th Cir. 1980), *cert. denied*, 445 U.S. 833 (1981), is therefore, inapposite.

In *Allen*, the Court of Appeals found that the following specific factors diminished Allen's expectation of privacy in his ranch from aerial surveillance:

1. the ranch was virtually on the United States seacoast border;
2. the coast guard helicopters routinely traversed the nearby air space for several reasons, including law enforcement;
3. the residents would, no doubt, have been aware of these routine flights;
4. any reasonable person cognizant of the ranch's proximity to the coastline and the coast guard's well known function of seacoast patrol and surveillance, could expect that government officers conducting such flights would be aided by sophisticated electronic equipment; and
5. such residents could not reasonably bear a subjective expectation of privacy from the coast guard's airborne telephotographic scrutiny—particularly where objects observed were large scale modifications of the landscape and a barn.

633 F.2d at 1290. Consequently, there is no basis in the record, as petitioner claims, to charge respondent with

[3] The officers flew to twelve locations taking pictures and looking for marijuana. There is no evidence in the record that respondent's house was in a flight line with the San Jose Airport. (J.A. 38).

knowledge of airborne law enforcement activity, routine or otherwise, and particularly not with knowledge of police use of photographic equipment.[4]

The fact that citizens are cognizant of commercial, or private aircraft flying in the navigable airspace in the general vicinity of their homes simply cannot mean that a citizen has lost or waived the reasonable expectation that he will not be the subject of governmental scrutiny by officers manning low flying aircraft. The vice here is that the government engaged in this intrusion.

The Fourth Amendment was designed specifically to protect the public from governmental intrusion. *See United States* v. *Jacobsen*, 466 U.S. ___, 80 L.Ed.2d 85, 104 S.Ct. 1652 (1984). The fact that a private citizen has intruded, or may intrude, into some protected place does not entitle the police to do the same. "The fact that Peeping Toms abound does not license the government to follow suit." *United States* v. *Kim*, 415 F.Supp 1252, 1256 (D.Haw. 1976).

This Court, in *Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319, 60 L.Ed.2d 920, 99 S.Ct. 2319 (1979) (per curiam), rejected the state's contention that an adult book store had no legitimate expectation of privacy against governmental intrusion because it displayed the arguably obscene items in areas of the store open to the public.[5]

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[4] The record does not reveal what power lens was used on the .35mm camera.

[5] *See also Marshall* v. *Barlow's Inc.*, 436 U.S. 307, 56 L.Ed.2nd 305, 98 S.Ct. 1816 (1978) (a warrant or its equivalent was required by the Fourth Amendment before OSHA inspectors could inspect the business premises of an unregulated industry even though employees were free to report violations to the government). *Cf. United States* v. *Jeffers*, 342 U.S. 48, 51, 96 L.Ed.59, 72 S.Ct. 93 (1951) (a maid, janitor or repairman may enter a hotel room, but the police without a warrant may not).

The Court stated:

> there is no basis for the notion that because a retail store invites the public to enter, it consents to wholesale searches and seizures that do not conform to Fourth Amendment guarantees. (citation omitted).

442 U.S. at 329. There is no evidence in the record that the police simply paralleled the actions of the general aviation public, or that they saw respondent's curtilage as a member of the aviation public might have seen it.

Government officials do not gain any constitutional entitlement to intrude upon an individual's privacy merely because a neighbor might observe a private yard and might reveal his observations to the police. Similarly, the warrantless invasion of respondent's privacy cannot be justified simply because commercial air travelers or repairmen on telephone poles might have discovered the marijuana garden, but did not. *Amicus curiae's* speculation as to what a repairman may or may not have been able to observe is of no constitutional relevance. *See United States* v. *Karo*, 468 U.S. ___, 82 L.Ed.2d 530, 104 S.Ct. 3296 (1984). As stated by Justice White in *Karo*, "[t]here would be nothing left of the Fourth Amendment right to privacy if anything that a *hypothetical* government informant *might* reveal is stripped of constitutional protection." 468 U.S. ___, 82 L.Ed.2d at 542 n.4, 104 S.Ct. at 3304 n.4.

> Under [this] view it could easily be said that in *Katz* v. *United States*, 389 U.S. 347 (1967), Katz had no reasonable expectation of privacy because the person to whom he was speaking might have divulged the contents of the conversation.

Id. Nor did Katz give up his expectation of privacy because, hypothetically, someone might have been able to read his lips through the glass doors of the telephone

booth. A partial invasion of privacy cannot automatically justify a total invasion. *United States* v. *Jacobsen*, 466 U.S. ___, 80 L.Ed.2d 85, 104 S.Ct. 1652 (1984); *Walter* v. *United States*, 447 U.S. 649, 659, n.13, 65 L.Ed.2d 410, 100 S.Ct. 2395 (1980).

The essence of petitioner's argument is that short of erecting an opaque bubble, no citizen can have an actual expectation of privacy because he knows that the government has the technological ability to surveil and photograph his home from above. The danger in adopting this Orwellian proposition[6] was keenly stated by Judge Kearse in *United States* v. *Taborda*, 635 F.2d 131, 137 (2d Cir. 1980):

> [I]t would be possible for the government by edict or by known systematic practice to condition the expectations of the populace in such a way that no one would have any real hope of privacy. *See* Orwell, 1984 (1949); *United States* v. *Kim*, 415 F.Supp at 1256-57; Amsterdam, supra at 384.

As of yet, "a person need not construct an opaque bubble over his or her land in order to have a reasonable expectation of privacy." *United States* v. *Allen*, 633 F.2d at 1289.

B. Respondent's Actual Expectation Of Privacy Is One That Society Is Prepared To Recognize As Reasonable.

For a society to remain free, it must be reasonable for a citizen to expect that the police will not use technology to

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[6] "Big Brother is Watching You . . . In the far distance a helicopter skimmed down between the roofs, hovered for an instant like a blue-bottle, and darted away again with a curving flight. It was the Police Patrol, snooping into peoples windows. The patrols did not matter, however. Only the Thought Police mattered." Orwell, *1984*, p. 6 (1949).

peer into private areas solely because they are open to the sky.

Granted, a citizen cannot expect privacy everywhere. *See Oliver* v. *United States*, 466 U.S. ___, 80 L.Ed.2d 214, 104 S.Ct. 1735 (1984). The logical extention of petitioner's view, however, will require this Court to hold that virtually any spot from which the sky can be seen may be lawfully spied upon by the police upon the mere whim of any petty officer. If the police are able to use such surveillance techniques without it being considered a search, then there can be no legitimate expectation of privacy for activities that occur beneath a skylight, within a walled courtyard or in a backyard surrounded by a ten foot fence.

Technology cannot be allowed to swallow our right to privacy, our right to be left alone, and our right not to be spied upon by our government.

> "Technology developments are arising so rapidly and are changing the nature of our society so fundamentally that we are in danger of losing the capacity to shape our own destiny.
>
> This danger is particularly ominous when the new technology is designed for surveillance purposes, for in this case, the tight relationship between technology and power is most obvious. *Control over the technology of surveillance conveys effective control over our privacy, our freedom and our dignity*—in short, control over the most meaningful aspects of our lives as free human beings." (Emphasis added). Hearings on Surveillance Technology Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 95 Cong. 1st Sess., June 23, 1975 (Opening Statements of Senator Tunney).

Hodges, *Electronic Visual Surveillance And The Fourth Amendment: The Arrival Of Big Brother*, 3 Hastings Const.L.Q. 261, 265 N.25 (1976).

The use of an airplane to purposefully spy into a private fenced yard to see that which is otherwise unobservable is just such a use of technology.

> Expectations of privacy are not earthbound. The Fourth Amendment guards the privacy of human activity from aerial no less than terrestrial invasion. At a recent but relatively primitive time, an X-2 plane could spy on ground activities from a height of 50,000 feet. Today's sophisticated technology permits overflights by vehicles orbiting at an altitude of several hundred miles. Tomorrow's sophisticated technology will supply optic and photographic devices for minute observations from extended heights. Judicial implementation of the Fourth Amendment need constant accommodation to the ever-intensifying technology of surveillance. In analyzing claims of immunity from aerial surveillance by agents of government, the observer's altitude is a minor factor. Horizontal extensions of the occupant's terrestrial activity form a more realistic and reliable measure of privacy than the vertical dimension of altitude . . . Reasonable expectations of privacy may ascend into the airspace and claim Fourth Amendment protection.[7]

Dean v. *Superior Court*, 35 Cal.App.3d 112, 110 Cal.Rptr. 585, 588-89 (1973). If Fourth Amendment protections do not apply to the police surveillance of respondent's private yard, then, where and after which new surveillance device, will this Court draw the line?

A free society cannot allow technology to force us all indoors in order to live without fear of being spied upon by our government. Free men must be unafraid to criticize

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[7] *See* Tell, *Suits Sight Spies in Sky*, National L.J., December 15, 1980 at 1, Col. 1, 28, Cols. 2-3 (U-2 spy planes can locate objects on the ground from up to 65,000 feet in the air.)

and even antagonize the government and its agents. Liberty cannot survive when the only protection from governmental spying left to a citizen is the hope that the government will not focus its attention and its technology upon him.[8]

II.

THE WARRANTLESS SEARCH OF RESPONDENT'S BACKYARD VIOLATED THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The constitutional reasonableness of a particular law enforcement practice is determined by "balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *New Jersey* v. *T.L.O.*, 469 U.S. ___, 83 L.Ed.2d 720, 731-21, 105 S.Ct. 733, 741 (1985); *United States* v. *Montoya de Hernandez*, ___ U.S. ___, ___ L.Ed.2d ___, 105 S.Ct. 3304 (1985); *Delaware* v. *Prouse*, 440 U.S. 648, 654, 59 L.Ed.2d 660, 99 S.Ct. 1391 (1979).

> On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order.

New Jersey v. *T.L.O.*, 469 U.S. ___, 83 L.Ed.2d at 731-32, 105 S.Ct. at 741. This case does not involve an area with a reduced expectation of privacy such as an automobile or school. This is an assault on the one area that has heretofore been most heavily protected. *See Payton* v.

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[8] "I am more and more convinced that man is a dangerous creature; and that power, whether vested in many or a few, is ever grasping, and, like the grave, cries 'give—give!' "

The Book Of Abigail And John: Selected Letters Of The Adams Family, 1762-1784, Letter to John Adams, November 27, 1775.

New York, 445 U.S. 573, 585, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980). The home is the one place where every man can retreat and relax in privacy. This Court is being asked to give the government blanket approval to focus its eyes and cameras upon any man's home and curtilage from any angle, so long as no technical trespass has occurred.

Because of the unlimited nature of this search, the privacy and security interests that have to be balanced are not only those of respondent's, or even his neighbors', but include the expectations of privacy of all people whose protected activities the government can watch from above. As this Court observed in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971), it was to minimize the use of harrassing so many innocent people that the Fourth Amendment requires the intervention of a judicial officer.

> [The warrant requirement] is not an inconvenience to be somehow "weighed" against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the "well-intentioned but mistakenly over-zealous executive officers" who are a part of any system of law enforcement.

403 U.S. at 481.

Moreover, the search in this case was not conducted as a discrete invasion of privacy limited only to a search for marijuana on respondent's property. *See United States* v. *Jacobsen*, 466 U.S. ___, 80 L.Ed.2d 85, 104 S.Ct. 1652 (1984); *United States* v. *Place*, 462 U.S. ___, 77 L.Ed.2d 110, 103 S.Ct. 2637 (1983). This police search was conducted at such a low altitude and with such photographic equipment that far more than the mere presence of marijuana was revealed. This search indiscriminately invaded the privacy of countless numbers of innocent citizens in

the Santa Clara vicinity. This search was, therefore, unlike the canine sniff in *United States* v. *Place*, or the chemical test in *United States* v. *Jacobsen*, where "[t]he reason this did not intrude upon any legitimate expectation of privacy was that the governmental conduct could reveal nothing about non-contraband items." 466 U.S. ___, 80 L.Ed.2d at 101 n.24, 104 S.Ct. at 1662 n.24.

Generally speaking, government searches which include the taking of photographs from a low flying airplane capture on film and make public everything that does not take place under an opague roof. Furthermore, by examining such photographs, it is possible to identify the people with whom individuals associate. By applying additional technology, the government and later the public can expose life's little intimacies, including the titles of books people read.

> It is inconceivable that the government can intrude so far into an individual's home that it can detect the material he is reading and still not be considered to have engaged in a search. (Citations omitted).

United States v. *Kim*, 415 F.Supp. 1252, 1256 (D.Haw. 1976).

The usefulness of aerial surveillance to eradicate open fields of marijuana where no reasonable expectation of privacy exists is not implicated in this case. *See, e.g.*, *Oliver* v. *United States*, 466 U.S. ___, 80 L.Ed.2d 214, 104 S.Ct. 1735 (1984). This is also not a case where the Court need address the problem of the police discerning the boundaries between open fields and curtilage. It was the officer's admitted goal to peer over the fence and into respondent's yard to surveil the curtilage for the presence of marijuana. (J.A. 30-31). In the balance:

> . . . it is . . . immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be

> most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Olmstead v. *United States*, 277 U.S. 438, 479, 72 L.Ed 944, 48 S.Ct. 564, 572-73 (1928) (Brandeis, J., dissenting).

In this age of advancing and potentially unlimited technology, the Bill of Rights cannot be read as covering only the methods of surveillance known in the 18th century. Unless this Court safeguards the public from the warrantless use of surveillance technology, an omniscient police will soon stand guard over a watched society.

CONCLUSION

Citizens of this great and free society cannot be required to paint black the sky lights and windows of their homes, or erect roofs over their yards, in order to have a reasonable expectation of privacy in their places of abode.

If the law now supposes that society deems such measures necessary, the law may add new recruits to those members of the public who already are inclined to agree with Mr. Bumble's well known remark, "If the law supposes that . . . the law is a ass . . . a idiot." C. Dickens, *Oliver Twist*, p. 377 (1912); *Cf. Estate of Thomas A. Wilson* v. *Aiken Industries, Inc.*, 439 U.S. 877, 58 L.Ed.2d 191, 192 n.3, 99 S.Ct. 366 (1978).

A free society cannot survive if its citizens are required to take measures that absolutely, rather than reasonably,

ensure that their privacy cannot be invaded by the government.

Respectfully submitted,

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